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In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

JEANNE A. JORDAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

REPLY BRIEF FOR THE APPELLANT

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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The district court has held unconstitutional the exclusion of certain "representative payees"—principally parents or spouses who live with the beneficiary—from the requirement under the Social Security Act that representative payees submit to the Secretary of Health and Human Services an annual accounting of their expenditures on behalf of the beneficiary. 42 U.S.C. (Supp. III) 405(j)(3)(B), 1383(a)(2)(C)(ii). The effect of the district court's holding would be to require the Secretary to insist upon an accounting from the representative payees for some three million more beneficiaries than Congress intended.

We have demonstrated in the jurisdictional statement: (a) that an erroneous or improper expenditure of funds by a representative payee is private conduct beyond the reach of the Due Process Clause (J.S. 16-18); (b) that the Secretary's payment of benefits to a properly selected representative payee likewise does not implicate the Due Process Clause, at least in the absence of a request to terminate the payee's status or knowledge by the Secretary

of derelictions that should lead him to do so sua sponte (J.S. 18-20); and (c) that even if the Due Process Clause is implicated in this setting, the exception from the accounting requirement for parents and spouses is fully consistent with due process because the familial bond furnishes strong protection against misapplication of funds, an accounting requirement would unnecessarily intrude into the family relationship, and adequate protection is afforded by the less intrusive requirement that the Secretary verify periodically that the parent or spouse payee continues to live with the beneficiary (J.S. 21-23).[1]

Appellees do not respond to the foregoing arguments in support of the constitutionality of the statutory scheme Congress enacted.[2] Instead, they seek in various ways to have the Court avoid addressing the constitutional issue on this direct appeal. All of appellees' avoidance tech-

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[1] Governmental institutions that are representative payees also are excepted from the accounting requirement, although the Secretary must establish a monitoring system for state institutions (42 U.S.C. (Supp. III) 405(j)(3)(C) and (D), 1383(a)(2)(C)(iii) and (iv)). Appellees have not shown that this monitoring system would afford inadequate protection, and in fact the district court previously had excluded governmental institutions for the mentally retarded from the annual accounting program because they are subject to monitoring (App. 44a-47a).

[2] Appellees also do not respond to our submission (J.S. 20-21 n.8) that appellees Jordan and Leeds could not properly represent a class challenging the absence of an accounting requirement for parents, spouses, and governmental institutions under the 1984 Amendments, since (a) the representative payee for each in fact did submit an accounting upon request, (b) there was no finding of wrongful expenditures by either payee that would constitute a "deprivation" of property even under appellees' theory that the actions of private payees are covered by the Due Process Clause, and (c) the representative payees whose actions Jordan and Leeds challenged were not their spouses or parents or a governmental institution, and they therefore would not have been covered by the statutory exemptions if the statutory accounting requirement had been in effect at the time. See J.S. 5-6.

niques are unavailing. The statutory provisions passed by Congress to address the subject of accounting by representative payees are entitled to a presumption of constitutionality – and to far greater respect in the courts than appellees urge.

1. Appellees first contend (Mot. to Dis. or Aff. 9-14) that the Court does not have jurisdiction of this appeal under 28 U.S.C. 1252 because the constitutional question is presented in the context of the district court's denial of the Secretary's motion for relief from judgment under Fed. R. Civ. P. 60(b), which ordinarily is reviewable only for an abuse of discretion. This contention is without merit.

Section 1252 provides for a direct appeal from *any* "interlocutory or final * * * order * * * holding an Act of Congress unconstitutional in *any* civil action" to which the government is a party (emphasis added). There is no exception for situations in which the Act of Congress was passed after the entry of a judgment addressing the same subject matter, so that the constitutionality of the statute could be presented to the court only in a motion for relief from that judgment. Nor is there any exception for orders that are reviewable under an abuse-of-discretion standard. To the contrary, the Court recently held that a preliminary injunction barring enforcement of a federal statute on constitutional grounds may be appealed to this Court under 28 U.S.C. 1252, even though a preliminary injunction ordinarily is subject to review only for abuse of discretion. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 316-319 (1985); compare *id.* at 341-344 (Brennan, J., dissenting).

An implicit exception for orders denying Rule 60(b) motions also would be inconsistent with the broad purpose of Section 1252 to provide for direct review in this Court of any judicial decision that is "adverse to the constitutionality of an Act of Congress" or "impair[s] [its] enforcement,"

and thereby "frustrates the will of Congress" (*Walters*, 473 U.S. at 318, 319). See generally *Heckler* v. *Edwards*, 465 U.S. 870, 879-883 (1984). Congress exempted parents, spouses, and governmental institutions from the mandatory annual accounting requirement in direct response to the district court's March 1984 order in this case. The district court's refusal to amend its nationwide order to exempt those payees was clearly "adverse" to the constitutionality of the 1984 Act and unquestionably "frustrate[d] the will of Congress."

2. Appellees argue (Mot. to Dis. or Aff. 13), however, that when the district court passed on the Secretary's motions to vacate, it simply held that "there were not sufficient exceptional circumstances" to cause the court to vacate its prior ruling, and that the court therefore "never analyzed, nor was it obligated to do so, the constitutional validity of any federal statute." Appellees are wrong. The district court was required to consider the constitutionality of the intervening statutory amendments when it considered the Rule 60(b) motions, and it in fact did so.

a. An injunction cannot be given prospective effect when intervening legislation renders it inconsistent with the underlying statutory framework, and it is an abuse of discretion for a court to decline to revise the injunction in such circumstances. *System Federation* v. *Wright*, 364 U.S. 642, 648-650 (1961); see also *Hodges* v. *Snyder*, 261 U.S. 600 (1923); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856). For this reason, if the statutory exemptions passed in 1984 are constitutional, the district court's injunction cannnot be given prospective effect to the extent it requires co-resident spouses and parents and governmental institutions to render an annual accounting. The district court therefore was required to consider the constitutionality of the 1984 amendments.

The district court's duty to consider the constitutionality of the 1984 amendments was reinforced by other factors.

In March 1984, when the district court rejected the Secretary's proposal for an accounting by a 10% sample of all representative payees and ordered the Secretary to require an annual accounting of all representative payees, it had no occasion to consider whether parents and spouses who live with the beneficiary should be exempted. See App. 41a-43a. Thereafter, Congress addressed the accounting issue with specific reference to this case and concluded that "it is neither necessary nor appropriate to require governmental supervision or detailed accounting in the case of close familial relationships (parent and child or spouses living together)" (S. Rep. 98-466, 98th Cong., 2d Sess. 29 (1984))—although Congress afforded substitute but less intrusive protection by requiring the Secretary to verify periodically that the payee still lives with the beneficiary. Because this Court "has been willing to assume a congressional solicitude for fair procedure" (*Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979)) and has paid considerable deference to Congress's assessment of the appropriate procedures under a statutory benefits program (*Walters*, 473 U.S. at 319-320, 330-331 n.12; *Schweiker* v. *McClure*, 456 U.S. 188, 200 (1982); *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976)), Congress's independent assessment of the competing considerations required a reassessment by the court.

b. What is more, the district court in fact *did* consider the constitutionality of the 1984 amendments, albeit both cursorily and erroneously. The court initially discussed the constitutional issue in its January 18, 1985, order addressing the Secretary's first motion for relief from judgment (see App. 54a), although the court concluded that it did not have jurisdiction to render a decision on that question because the Secretary's appeal was pending in the Tenth Circuit (App. 48a, 51a, 55a). Similarly, when it denied the Secretary's second Rule 60(b) motion on April 10, 1987, the district court stated: "The Court has reviewed the

[second] motion and the objections thereto of the plaintiffs *and again finds that the Secretary is not entitled to the relief sought*" (*id.* at 4a (emphasis added)).[3] In other words, the court "again [found]]" that the statutory exceptions to the annual reporting requirement are unconstitutional. Moreover, by virtue of the court's obligation to vacate the injunction if it concluded that the statutory amendments are valid, a finding that they are unconstitutional was a " 'necessary predicate' " to the denial of relief. Compare *California* v. *Grace Lutheran Church*, 457 U.S. 393, 405 (1982) (quoting *United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980)).

3. Appellees are wrong in contending (Mot. to Dis. or Aff. 14-19) that the doctrine of law of the case requires that the appeal be dismissed. Appellees base this contention on their view that the district court's March 17, 1983, order held that accounting is required of *all* representative payees on an *annual* basis, and that the Secretary's failure to appeal that order forever bars reconsideration of that issue by the district court. In fact, however, the district court in March 1983 did not specifically order the Secretary to require annual accounting by all representative payees; it merely ordered the Secretary to implement "appropriate mandatory periodic accounting procedures" within one year (App. 37a). The Secretary proposed to comply with the March 1983 order by implementing a system of accounting for a 10% sample of payees each year (subject to a follow-up audit), which obviously indicates that the Secretary did not construe the March 1983

[3] The court did not elaborate upon its holding. It merely noted that it had already engaged in the analysis required by *Mathews* v. *Eldridge* and had considered the legislative provisions concerning parents and spouses, and for these reasons "[found] it unnecessary to readdress those arguments presented by the Secretary" (App. 4a-5a).

order to have already mandated annual accounting by all payees.[4]

Although the district court in its March 1984 order rejected the 10%-sample approach and instead mandated universal annual accounting, the court did not base its rejection on the premise that it had already mandated universal annual accounting in the March 1983 order and that the Secretary's 10%-sample proposal therefore was foreclosed by principles of res judicata or law of the case. See App. 41a-43a. The court likewise did not state in its 1985 and 1987 orders addressing the Secretary's Rule 60(b) motions that the Secretary was barred by res judicata or law of the case from arguing that co-resident spouses and parents and governmental institutions should be exempted under the intervening statutory amendments (see *id.* at 49a-50a, 2a); instead, the court considered and rejected the Secretary's contentions on the merits (see *id.* at 52a-55a, 4a-5a). Accordingly, appellees are wrong in arguing that the Court does not have jurisdiction of this direct

[4] This construction of the March 1983 order of course explains the Secretary's decision not to pursue an appeal of the March 1983 order. For this reason, and contrary to appellees' repeated suggestion (Mot. to Dis. or Aff. 4, 12, 16, 25), the Secretary's dismissal of that appeal after a protective notice of appeal was filed (see Mot. to Dis. or Aff. App. 1a) did not manifest acquiescence in universal annual accounting. Appellees quote (Mot. to Dis. or Aff. 4 n.2) a passage from the opinion that the Tenth Circuit rendered on their appeal of other aspects of the March 1983 order, which stated that "[t]he Secretary did not appeal the trial court's order as to accounting, and indicated that he agreed with it" (App. 71a). Appellees fail to quote the succeeding sentences in the opinion: "The Secretary asserts in this appeal that she did not oppose *in principle* the accounting claim in the trial court. The trial court's original order was in general terms" (*ibid.* (emphasis in original)). The Secretary's agreement "in principle" to some accounting procedures reflects the fact that an accounting program had been in place prior to 1978 (although, significantly, that program also exempted custodial spouses and parents and governmental institutions (see S. Rep. 98-466, *supra*, at 29)).

appeal (and that the appeal therefore should be dismissed) because the district court's April 10, 1987, order did not actually hold an Act of Congress unconstitutional, but rather rejected the Secretary's motion on the procedural ground of res judicata or law of the case.

4. Finally, appellees, without even addressing the merits of the constitutional issue, make the astonishing suggestion (Mot. to Dis. or Aff. 19-26) that if the Court concludes that it has jurisdiction of this appeal under 28 U.S.C. 1252, it should summarily affirm the district court's April 10, 1987, order denying the Secretary's motion for relief from judgment. In appellees' view, the district court did not abuse its discretion in concluding that the Secretary had not presented sufficiently compelling circumstances to set aside the judgment.

As we have explained above, however, the district court was required to vacate its injunction if the statutory exemptions passed in 1984 are constitutional. See page 4, *supra*. For the reasons we have set forth in the jurisdictional statement (at 18-23), to which appellees have chosen not to respond on this appeal, those exemptions clearly are constitutional. The district court therefore abused its discretion in refusing to vacate the March 1983 and March 1984 orders insofar as they require annual accounting by co-resident spouses and parents and governmental institutions.

Appellees attempt to avoid that conclusion by relying on "the need for finality and the critical importance of the principle of *res judicata*" (Mot. to Dis. or Aff. 20). That reliance is singularly misplaced in this case. When the Rule 60(b) motions were filed, the Secretary's appeal of the March 1984 order was still pending in the court of appeals. Those motions therefore were in no way used as a substitute for an appeal of the March 1984 order, and that

order had not yet become final or assumed a binding res judicata or law-of-the-case effect. Compare *Ackerman* v. *United States*, 340 U.S. 193, 198 (1950). Indeed, because the injunction has been stayed pending appeal, reversal by this Court of the April 10, 1987, order denying the Secretary's Rule 60(b) motion would not alter the status quo or upset settled expectations.[5]

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[5] Appellees err in contending that relief was properly denied because the 1984 amendments "left most of the payees * * * with absolutely no due process protections" (Mot. to Dis. or Aff. 23). The 1984 amendments contain the new requirement that the Secretary periodically verify that co-resident spouses and parents continue to live with the beneficiary (42 U.S.C. (Supp. III) 405(j)(3)(B), 1383(a)(2)(C)(ii)), which ensures the continued existence of the bonds and responsibilities that furnish protection at least as strong as an annual accounting. Additional protection is afforded by enhanced criminal penalties for misuse of funds and the Secretary's authority to demand an accounting even from exempted payees if he has reason to believe that they are misusing funds. See J.S. 9, 22.

Equally without merit is appellees' contention (Mot. to Dis. or Aff. 23) that relief from judgment is not warranted because the Secretary will not suffer "extreme and unan[t]icipated hardship" if relief is denied. " 'The presumption of constitutionality which attaches to every Act of Congress is * * * an equity to be considered in favor of [the Secretary] in balancing hardships.' " *Bowen* v. *Kendrick*, No. A-99 (Aug. 10, 1987) (Rehnquist, C.J., in Chambers) (quoting *Walters* v. *National Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in Chambers)). Moreover, in this case, the burden of the accounting requirement would fall not only on the Secretary, but also on the representative payees for more than three million additional beneficiaries. Congress specifically determined when it enacted the 1984 amendments that governmental supervision of and mandatory accounting by parents and spouses living with the beneficiary were both unnecessary and inappropriate. S. Rep. 98-466, *supra*, at 29. That burden weighs heavily in favor of vacating the district court's March 1983 and March 1984 orders to the extent necessary to give effect to the exemptions in the 1984 amendments.

For the foregoing reasons and those stated in the jurisdictional statement, it is respectfully submitted that probable jurisdiction should be noted.

CHARLES FRIED
Solicitor General

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